No. 98-1536

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1998

Randon Bragdon, D.M.D.,

Petitioner,

v.

Sidney Abbott, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Randon Bragdon, D.M.D., replies to respondents Sidney Abbott and Maine Human Rights Commission ("Respondents") as follows:

First, Respondents do not attempt to deny the undeniable, namely, that the 1987 CDC Guidelines literally say the opposite of what the Appeals Court says they say. Instead, as Respondents have done all along, they simply assert there is a wealth of evidence to support them, without citing one, single, solitary, concrete example of any affidavit, article, public health official guideline, or anything else in the entire universe, that was available to dentists in September 1994, which would convince a reasonable dentist there was no significant risk using universal precautions.

Second, Respondents do not address the extremely problematic conflict among the circuits on what level of risk is legally significant, or whether the lives of health care workers are less valuable than patients, prison inmates, or other citizens. These are important issues of law worthy of the Court's attention.

Third, contrary to Respondents, the lower courts have not reviewed theses issues on three occasions. The District Court applied an incorrect legal standard. The Appeals Court incorrectly relied on the 1993 CDC Guidelines and the American Dental Association policy statement. Now the Appeals Court incorrectly relies on the 1987 CDC Guidelines and unilateral assertions made for the first time by the American Dental Association in its amicus brief on remand in 1998. It is noteworthy that Robert J. Gherardi, B.S., D.M.D., FAGD, FACD, FADI, Vice-Chairman of the American Dental Association's Council on Dental Therapeutics in 1991, and a member of the Association's Reference Committee on Scientific Matters in 1992, has filed a *amicus* brief in support of Dr. Bragdon. *See* Br. of Amicus Curiae Congressman Charles Norwood, D.D.S., et al., at 16a.

Fourth, Respondents make a series of specious procedural arguments, all raised for the first time. For example, they now object that the article at 318a was not part of the record before the District Court. However, it was. *See* Response by Randon Bragdon to motion for Summary Judgment, p. 3, n.4 (citing, among others, Tokars, et al., to support Dr. Kuvin's use of a 0.3% infectivity rate in his calculations) (docketed Oct. 6, 1995).

Then, according to the most brazen double-standard of all, Respondents are content to have the Appeals Court rely on assertions made by the American Dental Association for the first time in its amicus brief on remand in 1998, but object to the letters at 414a and 416a, written in 1990 by the American Dental Association Council-on-Dental Therapeutics, advising the American Association of Forensic Dentists that the Council could find no scientific support that gloves and other infection control barrier techniques effectively reduce the transmission of microorganisms.

The Court must also keep in mind that at the District Court level, neither party introduced evidence for summary judgment on the theory there would be a legal distinction made between pre-September 1994 and post-September 1994 sources of information. In the original appeal, the Appeals Court reached this issue and stated a correct legal standard that post-September 1994 information should not be used against Dr. Bragdon, but the case was not remanded for the introduction of evidence to comport with the new legal standard. Thereafter, again, one of the difficult consequences of this Court's remand to the First Circuit, rather than to the District Court (and later the First Circuit's denial of Dr. Bragdon's motion to permit experts to sort out the pre- and post-1994 evidence), is that experts have never been given a chance in this case to focus on what was available before September 1994. Nevertheless, the indisputable fact is that the article at 418a and the article quoted on page 15 of the petition are important examples of information written for and available to dentists in 1994, which would have led them

reasonably to believe universal precautions do not eliminate significant risks. Though Respondents did not object to these articles on remand, they now object to the Court's consideration of them during the petition process. *See also* Br. of Amicus Curiae Clinical Research Associates at 2, 18 ("Failure of infection control products that support the universal precautions concept virtually negates the concept" and "CRA's data indicate that there *is* a significant risk, not overcome by universal precautions, every time HIV positive patients receive treatment where bleeding tissue and use of sharp instruments is involved").

Fifth, Respondents raise again a specious argument already implicitly rejected by the District Court and the Appeals Court, namely, that in filing and arguing for his own motion for summary judgment in the District Court, Dr. Bragdon somehow waived the argument there could be genuine issues for trial. As any first year civil procedure student should understand, the argument that when evidence is viewed most favorably for the plaintiff, no reasonable person could find for her, necessarily entails the view that when the evidence is viewed most favorably for the defendant, reasonable persons could find for him. *See* 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2720 at 16-17 (1983) ("the fact that both parties simultaneously are arguing there is no genuine issue of fact does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit"); *id.* § 2725 at 104-108 (a party moving for summary judgment "is not entitled to a judgment merely because the facts he offers appears more plausible . . . or because it appears that the adversary is unlikely to prevail at trial. This is true even though both parties move for summary judgment.").

Attached is the full argument of counsel quoted out of context by Respondents. When pressed by the Court, it is clear that the thrust of counsel's argument was precisely that "when viewed in the light most favorable to the plaintiff, no reasonable person could conclude that there was not a

significant risk." *See* appendix pages 1,2,7 of this reply. Under rudimentary principles of civil procedure, this does not empower the District Court to grant summary judgment if there are genuine issues of fact. And of course, to this day, Dr. Bragdon believes he should have been granted summary judgment based on the undisputed expert testimony that the risk to him is as great or greater than to his patients, and the agreement among the Fourth, Fifth, Sixth, and Eleventh Circuits, and district courts in the Third and Eighth Circuits, that the risk to patients is legally significant despite universal precautions.

CONCLUSION

There are important issues of law at stake concerning the value of human life and whether patients and other citizens are more valuable than health care workers. The Appeals Court's opinion on remand is more patently infirm than the one already vacated by the Court. Four members of the Court already agree Dr. Bragdon clearly deserves a trial. Three were uncertain. Dr. Bragdon respectfully asks the Court to decide.

Respectfully Submitted,

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ABBOTT v. BRAGDON

Transcript of Proceedings
Hearing on Motions
U.S. District Court, District of Maine
October 26, 1995

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MR. SINGER: Your Honor, I'm Brent Singer for the defendant, Dr. Bragdon. I'd like to say just a few things and, of course, then I'll be happy to entertain questions from the court.

In ruling on the plaintiff's motion for summary judgment, the court must of course view the evidence in the light most favorable to Dr. Bragdon and see if a jury would be permitted from that to find that there is significant risk. And indeed, that's the issue in this case, is whether or not there's a significant risk to Dr. Bragdon when he treats a patient who is HIV-positive.

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And the CDC, despite what they have said, has not taken the position on the issue of significant risk. And its findings and its writings strongly imply that there is a significant risk, although the CDC has not expressly taken that position.

For example, the CDC has an article in the September '95, Journal of the American Dental Association, "JADA" for short. It would have been a perfectly appropriate time for the CDC in that article to inform dentists like Dr. Bragdon that they don't have to worry because the risk is insignificant, because it's infinitesimal, because it's negligible, etc. But that article does not say anything like that, and that's an article on

the risk to dentists from percutaneous injuries while performing basic procedures on health care workers.

Dr. Marianos is not the CDC. He is equivalent to someone who works for the EPA, even a high level EPA official, coming to the court and telling the court what the EPA meant to say in its official documents, but what it didn't actually say in its official documents.

Now we, of course, believe that, when the evidence is viewed in the light most favorable to the plaintiff, a jury would be compelled to find that there is a significant risk. That's one of the bases of our motions for summary judgment.

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For example, according to the CDC, there are 46 CDC-documented health care workers – it was 42, but more recent publication shows 46 – 46 CDC-documented health care workers who have HIV or have already died because of accidental exposure on the job to HIV-infected patients, plus an additional 97 other health care workers, including six dentists, for whom no risk factors have been identified by the CDC.

THE COURT: The plaintiff says that health care workers are judged on a different standard. We shouldn't be too concerned about that from the standpoint of HIV patients. You want to approach that argument or discuss it?

MR. SINGER: I see no legal basis for the conclusion that under the statute significant risk means one thing for Dr. Bragdon and another thing for patients. As stated in the brief, I think the plaintiffs invite the court to engage in a kind of calculus here where you begin to deem some lives more valuable than others. They argue, of course, that, because Dr. Bragdon is a dentist, he has somehow assumed this risk. We

do not think that's the case, but even those people in our society who undertake dangerous jobs and professions, it's not the role of the government then to force them to continue doing so.

THE COURT: Well, there hasn't been any finding by

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anyone that this is dangerous, is there?

MR. SINGER: The performance of invasive procedures –

THE COURT: In a dentist's office? Have you got any evidence to support that conclusion?

MR. SINGER: If I could quote, for example, to look at the CDC's 1993 guidelines on infection control in the dental office, not what the plaintiff say they say, but the guidelines themselves. It's an interesting document. It begins by describing the risk of transmission to dentists from infection of HIV in the office. It describes some elaborate and, according to the document itself, sometimes ineffective barrier precautions. It says – it concludes only that this, quote, should reduce the risk, which is obvious since, if you put on a pair of gloves, they're going to help somewhat. But that additional information is needed for an accurate assessment and that such information may lead to safer practices.

Now our position is that that implies that there must be some significant risk to the dentists because, otherwise, what are they doing in these articles? Why don't –

THE COURT: Let me ask you this. I mean, Mr. Webbert seems pretty clear about the fact that there doesn't seem to be any question at all that the CDC

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determination is that, in fact in a quotation form Mr. Marianos, that no infection control procedures beyond the use of universal precautions are necessary when providing routine dental care to persons with HIV and AIDS. And the affidavits and information contained in the material that's been presented to me by the plaintiffs would seem to lead to a pretty clear consensus that, as far as the CDC is concerned, there's no problem.

Are you suggesting that that's an – that's not necessarily an accurate recapitulation of what the evidence really is?

MR. SINGER: I'm suggesting that you need to read the CDC sources carefully and statements abound like "this can be done safely in the dental office." Well, as we point out, one can parachute safely with a parachute, one can perform invasive dental procedures in a dental office on persons with HIV. The issue is not whether or not it can be done safely; the issue is whether or not there's a significant risk in doing it. And that's what the CDC has not spoken on, and that is a glaring, absolutely glaring omission in their official published work.

Indeed, Dr. Marianos, unlike the other experts for the plaintiff, does not in his affidavits claim the risk is negligible or infinitesimal. As a spokesperson from the CDC, he goes about as far as saying that no additional precautions

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are necessary, which doesn't imply that they're not advisable. He goes as far as to say that it can be done safely, which doesn't say that it is safe.

Indeed, the plaintiff's – I'm sorry, the attorney for the United States has argued before the court today on several occasions that the CDC says that it is safe, but the CDC does not say it is safe.

THE COURT: So, who is going to make that determination in this case? Are you suggesting then that there may very well be a factual issue as to whether or not the procedure is safe and whether or not the CDC says it's safe, and that that determination should be made by a fact finder in this case?

MR. SINGER: Well, I think, fortunately, the court has some guidance at the summary judgment stage from their own experts. Numerous courts for good reasons have determined that the risk from health care provider to patient is significant, including the risk from dental practitioner to patient. And we know that HIV has been transmitted from the dentist to the patient, and then their own expert in print and under oath states that the risk is much greater from patient to dentist.

THE COURT: Talk about the eyes of the beholder.

Now you want me to make a determination, if I understand you correctly, as a matter of law on summary

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judgment that just the opposite is the case. So, here I have the plaintiff coming before me and saying, first of all, you have your instructions, Judge Brody, from the United States Supreme Court, and you know who that is, and the United States Supreme Court says, You look up the very clear policy of the CDC and, when you look it up, because I've attached to it my memorandum, you'll see that it says no problem. And

because it says no problem, summary judgment has to issue for the plaintiff.

Then you come along and say you're not sure. In fact, you're saying the CDC may be saying just the opposite if you analyze their statements carefully and find the right ones, and you want me to say – I assume you want me to also follow the Unites State Supreme Court, right? And that means the first stop is the CDC, right?

MR. SINGER: (Nodding in the affirmative.)

THE COURT: And you're saying that, at that stop, the information isn't quite so clear, but it's certainly clear enough for the defendant to get summary judgment. Isn't that where I am?

MR. SINGER: Our position, your Honor, -- it's actually shocking when you read the CDC material itself the extent to which it supports Dr. Bragdon's position rather than the plaintiff's position. And when you say – when you look at all these sources that say no problem, we were

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under – they give the – the plaintiffs give the impression that, somehow out there, there is a multitude of official CDC publications or guidelines saying this. But if you look at the record, it is the defendant by and large who is inviting the court and attaching original sources and so forth for the court's attention.

Now, the significance of the risk, as I say, follows we think as a matter of law from their CDC's – from cases that have deferred to the CDC.

THE COURT: Can I interrupt you for a minute, because at some point we're going to have to make a determination here, both in these summary judgment motions and ultimately, if necessary, at trial. Is it you position, is it the defendant's position that this issue can be resolved as a matter of law by summary judgment one way or the other? That there is no factual issue to be resolved?

MR. SINGER: Absolutely. That's the basis of our motion for summary judgment, which Mr. McCarthy is prepared to speak with more directly to those points.

THE COURT: So we don't need a jury determination as to this issue because you're suggesting there isn't any factual issue. It can be decided as a matter of law.

MR. SINGER: Well, it can be decided as a matter of law because no – on this record, when viewed in the light most favorable to the plaintiff, no reasonable person could

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conclude that there was not a significant risk. It's obvious there's a significant risk.

THE COURT: Well, it's just as obvious to the plaintiff that there isn't. I mean, you heard his argument. Pretty direct argument, wasn't it?

MR. SINGER: Our evidence is based upon court cases that have found significant risk and expert testimony from their experts that –

THE COURT: Court cases that have found significant risk in this kind of situation?

MR. SINGER: Absolutely. They have found that the risk of transmission of HIV in an invasive dental procedure from dentist to patient is so significant that the dentist can lawfully be prohibited from performing a single additional invasive procedure. Their experts say, including the expert from CDC, acknowledges that the risk is at least as great, some of their experts say greater, to Dr. Bragdon. So, we have a difficult time understanding how there could be a genuine issue of fact regarding the significance of risk to Dr. Bragdon.

THE COURT: Thank you.